

**ENGINEER PROCURE CONSTRUCT (FIJI) LTD v SIGATOKA
ELECTRIC LTD (HBC0150 of 2011L)**

5 HIGH COURT — CIVIL JURISDICTION

TUILEVUKA M

20, 21 February 2012

10 **Practice and procedure — parties — immunity against proceedings — third parties — institution of proceedings — whether third party proceedings against Matapo Ltd are sustainable — joint venture partnership — immunity — Momi Bay Development Decree s 9.**

15 The defendant was the contractor engaged to install electrical infrastructure at the Momi Bay site. Matapo Ltd was the owner and developer of the Momi Bay Integrated Resort Development Project. The defendant entered into an arrangement with the plaintiff for the installation of cable. The plaintiff is suing the defendant for \$898,069.82 plus interest. Its claim is premised on the ground that it was sub-contracted by the defendant to install the
20 cable. The defendant argued that its relationship with the plaintiff was founded on a joint-venture partnership and therefore whatever services the plaintiff provided was to Matapo Ltd. On that footing, the defendant has instituted third party proceedings against Matapo Ltd.

Held –

25 Section 9(1) of the Momi Bay Development Decree 2010 only grants immunity to the Fiji National Provident Fund (FNPf) and the Fiji Development Bank (FDB) from certain proceedings. It does not grant any immunity to Matapo Ltd and therefore the third party proceedings against Matapo Ltd are not prohibited. Matapo Ltd however is not entitled to institute fourth party proceedings against FNPf or the FDB under s 9 of the Decree.

30 Third-party proceedings against Matapo Ltd were not prohibited.

R. Patel Lawyers for the Plaintiff.

Pillai Naidu & Associates for the Defendant.

35 **Tuilevuka M.**

INTRODUCTION

[1] I am being asked to determine whether or not the third party proceedings
40 against Matapo Ltd is sustainable under the Momi Bay Development Decree 2010. My authority to deal with this matter derives from a directive dated 06 October 2010 by the Honorable Chief Justice to all Judicial Officers on Procedure for Referring Civil Matters to Chief Registrar¹

45 1. The said directive states as follows:

When the question of whether a case falls within a category where the Chief Registrar may consider termination under one or other Decree, it may be wise to follow the following procedure:

50 1. If the parties to the litigation agree that the case does come within the relevant Decree, the judge can make the necessary order to refer it to the Chief Registrar for her consideration.
2. If the parties do not so agree, the judge should ask for submissions and have the issue argued, then rule. This way, the litigants have the opportunity of a hearing to argue that it does not come within the respective Decree.

MOMI BAY DEVELOPMENT PROJECT

[2] Matapo Ltd was the owner and developer of the Momi Bay Integrated Resort Development Project (“project”). It began construction work around June 2004. But the project however was halted around December 2006 because
 5 Matapo had run into financial difficulties. The extent to which Matapo was crippled by its financial crisis soon manifested in its inability to pay the ever mounting interest on its mortgage debt to Fiji National Provident Fund and to the Fiji Development Bank²

10 [3] Between September 2006 to January 2009, Matapo Ltd tried to convince FNPF and FDB to restructure and to increase the loan facility by an additional grant of some \$33 million to enable it to complete stage 1 of the project. FNPF and FDB however refused and eventually sent demand notices in early 2009.

[4] The FNPF eventually did exercise its right of foreclosure over the property.

15 THE MOMI BAY DEVELOPMENT DECREE

[5] The Decree (Decree No 28 of 2010) was promulgated soon after the FNPF took over the Momi Bay Project.

20 [6] The aim of the Decree is to set up a scheme to protect FNPF and FDB and to help them realise their securities to the maximum.

[7] The Decree protects FNPF and FDB by guaranteeing that FNPF has a smooth and uninterrupted acquisition of the property³ – which is essential if they are to recover the public funds they had invested on the project.

25 [8] Section 9 is very much at the heart of the protective scheme of the Momi Bay Development Decree. What this section does is to grant immunity to FNPF and FDB from any civil claim which relates either to any aspect of their involvement in the Momi Bay Integrated Development Project or to their foreclosure on the land.

30 [9] Below I reproduce the relevant provisions of s 9.

Immunity from proceedings

35 9.(1) No person shall be entitled to bring any proceeding of any nature whatsoever in any court, tribunal or commission or before any other body exercising a judicial function which, whether directly or indirectly, seeks to make any claim or seeks any relief including compensation, damages, indemnity or contribution against FNPF or the Fiji Development Bank or purports to claim any relief by way of a counterclaim or joinder as a party to any proceeding for anything done or omitted to be done by virtue of any duty or obligation imposed, (whether contractual or otherwise) under the common law, equity, any statutory or other written law, agreement, deed, mortgage, debenture or other document or instrument on FNPF or the Fiji Development Bank in relation to their involvement and actions taken as a financier or mortgagee in the Momi Bay Integrated Resort Development.

40 (2) Any action which is presently pending before any court, tribunal or commission or before any other body exercising a judicial function, shall
 45 immediately terminate upon the commencement of this Decree including any pending appeals and all orders or judgments granted prior to that date shall be

2. In about November 2005 the parties entered into a Syndicated Loan Facility Agreement (the loan facility) whereby the Plaintiff secured funding in the sum of \$56m from the First Defendant and \$18m from the Second Defendant.

50 3. The two lenders had appointed FNPF to act as their agent in respect of all matters pertaining to the loan facility agreement.

5 vacated save in so far as any decision or judgment, whether directly or indirectly, which had upheld the validity of any securities or rights of FNPF and Fiji Development Bank as mortgagee or lenders under the lending facility agreement with the Developer, and a certificate to that effect shall be issued by the Chief Registrar, tribunal, commission or any other person or body exercising a judicial function, and the provisions of subsections (4) and (5) of s 8 shall apply mutatis mutandi.

THE THIRD PARTY PROCEEDINGS

10 [10] Sigatoka Electric Ltd (“SEL”), the defendant, was the contractor engaged by the consulting engineers and project manager to install electrical high voltage as well as low voltage infrastructure at the Momi Bay site. SEL then entered into an “arrangement” with the plaintiff, Engineer Procure Construct (Fiji) Ltd (“EPCFL”) for the installation of in-ground High Voltage Cable.

15 [11] The ongoing issue between SEL and EPCFL is: what exactly was their “arrangement”?

[12] EPCFL is suing SEL for the sum of \$898,069.82 plus interest of \$717,566.577 from 01 January 2007 to 20 September 2011 and daily interest of \$557.12 from 21 September 2011. Its claim is premised on the argument that it was sub-contracted by SEL to install in-ground high-voltage cable.

20 [13] On the other hand, SEL’s statement of defence is built on the theory that EPCFL’s and SEL’s relationship was founded on a joint-venture partnership. Therefore, whatever materials and/or services that the former provided in the Momi Bay Project, was to the developer, Matapo Ltd. On that footing, SEL has
25 instituted third party proceedings against Matapo Ltd.

DOES THE DECREE PROHIBIT THE THIRD PARTY PROCEEDINGS AGAINST MATAPO?

30 [14] Section 9(1) of the Decree in its relevant part only grants immunity to FNPF and FDB from any proceeding “whether directly or indirectly, [which] seeks to make any claim or seeks any relief ... or purports to claim any relief by way of a counter-claim or joinder as party to any proceeding....”.

[15] It does not grant any immunity to Matapo Ltd.

CONCLUSION

35 [16] The third-party proceedings against Matapo Ltd is not prohibited under s 9 of the Momi Bay Development Decree 2010. Matapo Ltd however is not entitled to institute 4th party proceedings against FNPF or the FDB under s 9 of the Decree.

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Ruling made.

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